Andrew P. Holland/Bar No. 224737
aholland@thoits.com
Mark V. Boennighausen/Bar No. 142147
mboennighausen@thoits.com
Jared M. Ahern/Bar No. 279187
jahern@thoits.com
THOITS LAW
A Professional Corporation
400 Main Street, Suite 250
Los Altos, California 94022
Telephone: (650) 327-4200
Facsimile: (650) 325-5572

Attorneys for Defendant and Counterclaimant David Foote

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED, a Macao entity,

Plaintiff,

v.

DAVID FOOTE,

Defendant.

DAVID FOOTE, an individual,

Counter-claimant,

v.

MUSIC GROUP MACAO, COMMERCIAL OFFSHORE LIMITED, a Macao entity,

Counter-defendant.

No. **3:14-cv-03078-JSC**

DEFENDANT AND COUNTER-CLAIMANT DAVID FOOTE'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: May 21, 2015
Time: 9:00 a.m.
Place: Courtroom F – 15th Floor

[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

TO MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 21, 2015 at 9:00 a.m., in courtroom F of the United States Courthouse, located at 450 Golden Gate Avenue, San Francisco, CA 94102, defendant and counter-claimant David Foote will and hereby does move this Court for an order granting summary judgment in favor of Foote on all of the causes of action in the First Amended Complaint or, alternatively, partial summary judgment on such causes of action and/or issues as the Court deems fit to grant such relief based on the arguments and evidence submitted with this motion as more particularly described in the accompanying memorandum of points and authorities.

The grounds for this motion are that there is no genuine issue as to any material fact and that Foote is therefore entitled to judgment as a matter of law on the claims raised in the First Amended Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. Foote requests that the Court enter an order substantially in the form of the proposed order attached hereto as Exhibit 1. If you oppose this motion you must file an opposition and any evidence in support by April 28, 2015 pursuant to Local Rule 7-3.

Dated: April 14, 2015.

THOITS LAW

By: /s/ Andrew P. Holland
Andrew P. Holland
aholland@thoits.com
Mark V. Boennighausen
mboennighausen@thoits.com
Jared M. Ahern
jahern@thoits.com
Attorneys for Defendant and Counter-Claimant David Foote

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 2

A. The Parties 2

B. The August 27, 2010 Consulting Agreement 3

C. Foote's Work as a Consultant 5

D. Music Group's Network Technology Staff 6

E. The Intentional August 17, 2013 Cyber-Attack is Carried Out and Foote's Contract is Terminated Effective August 23 With No Claim He Violated Any Obligation Owed to the Company 7

F. Music Group's Investigation Determines that [redacted] and [redacted] Carried out the Cyber-Attack 8

G. Music Group's only Claimed Damages are Those Allegedly Caused By the Cyber-Attack Which the Company Concluded was Carried Out by Employees [redacted] 9

III. ARGUMENT 9

A. Legal Standard on Summary Judgment 9

B. Foote is Entitled to Summary Judgment on the Breach of Contract Claim 10

1. Interpretation of the Contract is a Question of Law 10

2. There was no Breach of any of Foote's Contractual Obligations 11

3. Music Group's Damages Were not Caused by Foote 12

4. Music Group's Alleged Damages are not Recoverable Because they were Not Foreseeable by Foote at the Time of Contracting 13

C. Foote is Entitled to Summary Judgment on the Contractual Indemnity Claim 15

1. There can be no Liability on the Indemnity Clause Because Foote did not Breach the Consultancy Agreement and any Damages Suffered by Music Group were not Caused by Foote 15

2. The Indemnity Cause of Action also Fails Because it Only Covers Damages Caused by Third-Party Claims 16

3. Music Group's Negligence Forecloses its Recovery Under an Indemnitee Theory 18

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

4. Social Policy does not Support Requiring Foote to Indemnify Music Group 18

5. Music Group Never Made a Timely Claim for Indemnification Against Foote During the Term of the Contract 19

D. Foote is Entitled to Summary Judgment on the Negligence Claim..................... 19

1. Music Group Cannot Establish Foote Owed a Tort Legal Duty 19

2. Music Group Cannot Establish the Necessary Legal Causation For Its Negligence Claim… 21

IV. CONCLUSION 23

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Addisu v. Fred Meyer, Inc.
198 F.3d 1130 (9th Cir. 2000) 10

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) 10

Carson Harbor Vill., Ltd. v. Unocal Corp.
287 F.Supp.2d 1118 (C.D. Cal. 2003) 22

Celotex Corp. v. Catrett
477 U.S. 317 (1986) 10

Coleman v. Quaker Oats Co.
232 F.3d 1271 (9th Cir. 2000) 9

Coneff v. AT&T Corp.
673 F.3d 1155 (9th Cir. 2012) 10

Netbula, LLC v. Bindview Dev. Corp.
516 F.Supp.2d 1137 (N.D. Cal. 2007) 12

Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.
637 F.Supp.2d 712 (C.D. Cal. 2008) 11

Stanford University Hospital v. Fed. Insurance Corp.
174 F.3d 1077 (9th Cir. 1999) 18

Twin City Fire Ins. Co. v. Philadelphia Life Ins. Co.
795 F.2d 1417 (9th Cir. 1986) 15

United States v. King Features Entertainment, Inc.
843 F.2d 394 (9th Cir. 1988) 12

Valenzuela v. ADT Sec. Servs.
820 F.Supp.2d 1061 (C.D. Cal. 2010) 20

State Cases

Ash v. North American Title Co.
223 Cal.App.4th 1258 (2014) 13

Bank of the West v. Superior Court
2 Cal.4th 1254 (1992) 10

Brown v. Cal. Pension Adm'rs & Consultants
45 Cal.App.4th 333 (1996) 20

Bruckman v. Parliament Escrow Corp.
190 Cal.App.3d 1051 (1987) 12, 13

Capolungo v. Bondi
179 Cal.App.3d 346 (1986) 21

City of Bell v. Superior Court
220 Cal.App.4th 236 (2013) 17

E. L. White, Inc. v. Huntington Beach
21 Cal.3d 497 (1978) 18

Erlich v. Menezes
21 Cal.4th 543 (1999) 20

Espinosa v. Little Co. of Mary Hospital
31 Cal.App.4th 1304 (1995) 12

Evan F. v. Hughson United Methodist Church
8 Cal.App.4th 828 (1992) 18

Freeman & Mills, Inc. v. Belcher Oil Co.
11 Cal.4th 85 (1995) 20

Gonzalez v. Derrington
56 Cal.2d 130 (1961) 22

Hardison v. Bushnell
18 Cal.App.4th 22 (1993) 22

Hunt Bros. Co. v. San Lorenzo Water Co.
150 Cal. 51 (1906) 13, 14

Hurtado v. Superior Court
11 Cal.3d 574 (1974) 10

Jones v. Strom Constr. Co.
527 P.2d 1115 (Wash. 1974) 19

Kearl v. Bd. of Medical Quality Assurance
189 Cal.App.3d 1040 (1986) 16

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Lamkins v. International Harvester Co.
182 S.W.2d 203 (Ark. 1944) 15

Martin v. U-Haul Co. of Fresno
204 Cal.App.3d 396 (1988) 14

Mendoza v. City of Los Angeles
66 Cal.App.4th 1333 (1998) 20

Metzenbaum v. R.O.S. Assocs.
188 Cal.App.3d 202 (1986) 12

Mitchell v. Gonzales
54 Cal.3d 1041 (1991) 22

Myers Bldg. Indus., Ltd. v. Interface Technology, Inc.
13 Cal.App.4th 949 (1993) 16

Nichols v. Keller
15 Cal.App.4th 1672 (1993) 20

Nola M. v. University of Southern California
16 Cal.App.4th 421 (1993) 22

North American Chemical Co. v. Superior Court
59 Cal.App.4th 764 (1997) 20

Oceanside 84, Ltd. v. Fidelity Federal Bank
56 Cal.App.4th 1441 (1997) 10

Phillips v. TLC Plumbing, Inc.
172 Cal.App.4th 1133 (2009) 18, 22

Queen Villas Homeowners Assn. v. TCB Property Management
149 Cal.App.4th 1 (2007) 17

Ratcliff Architects v. Vanir Construction Management, Inc.
88 Cal.App.4th 595 (2001) 21

Rooz v. Kimmel
55 Cal.App.4th 573 (1997) 17

Rutherford Holdings, LLC v. Plaza Del Rey
223 Cal.App.4th 221 (2014) 10

Southern Pac. Transp. v. Santa Fe Pac. Pipelines, Inc.
74 Cal.App.4th 1232 (1999) 11

Wilshire-Doheny Associates, Ltd. v. Shapiro
(2000) 83 Cal.App.4th 1380 16

Winet v. Price
4 Cal.App.4th 1159 (1992) 11

State Statutes

Cal. Civ. Code § 1636 10

Cal. Civ. Code § 2772 16

Cal. Code of Civ. Pro. § 1654 17

Rules

Fed. R. Civ. P. 56 .... 1, 10

Other Authorities

RESTATEMENT (SECOND) OF CONTRACTS, § 351 cmt. f. 13, 15

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant and counterclaimant David Foote ("Foote" or "Defendant") submits this memorandum in support of his motion for summary judgment or partial summary judgment pursuant to Federal Rule of Civil Procedure 56 as to the First Amended Complaint ("FAC") (Court Docket Document (hereinafter "Doc.") No. 5.) filed by plaintiff Music Group Macao Commercial Offshore Limited ("Music Group" or "Plaintiff").

I. INTRODUCTION

Music Group, an international company with over 3,500 employees and $260 million in annual revenue, has sued its $125 an hour former consultant, David Foote, for alleged damages that resulted because of an intentional August 17, 2013 "cyber-attack."

Remarkably, Music Group filed this suit despite the company's own investigation determining that two disgruntled Music Group employees, [redacted], and [redacted], an employee who reported to [redacted], carried out the attack. Even more remarkable, Music Group sued Foote, despite Foote recommending to Music Group CEO Uli Behringer that [redacted] be terminated from the company prior to the attack.

The FAC asserts three legal claims: 1) breach of contract; 2) express contractual indemnity; and 3) negligence. These legal theories are all based on an August 27, 2010 written consulting agreement between Music Group and Foote. The plain terms of this agreement, drafted by the company, cannot be interpreted to make Foote an insurer to Music Group for the conduct of the company's own employees, or the guarantor of Music Group's network security.

Thus, Music Group's breach of contract claim fails because nothing Music Group alleges Foote did or did not do is specified in the written contract. The contract claim also fails because Music Group cannot establish that any alleged conduct on the part of Foote was a substantial factor in causing the cyber-attack. Indeed, Music Group has admitted it has no evidence that Foote had anything to with the cyber-attack. Further, the alleged contractual damages are also barred because it was not reasonably foreseeable, at the time of contracting, that Foote would be responsible for damages resulting from Music Group's network security employees' intentional act of attempting to destroy the company's network.

The express contractual indemnity clam fails for numerous reasons: (1) there are no third-party claims against Music Group, which are the only claims covered by the clause as a matter of law; (2) Foote was not grossly negligent as required by the clause; and, (3) Music Group's own conduct in employing and retaining employees with high level network access, in [redacted] and [redacted], after being specifically warned of the risk they presented, forecloses any indemnity claim on the part of Music Group. Music Group also made no indemnification claim during the term of the consulting contract, which bars its reliance on this term.

The negligence claim also fails on multiple grounds. First, it relies on the consulting agreement as the source of the legal duty. But a contract cannot create tort duties outside the insurer-insured context or other narrow exceptions not present here. Further, the intentional conduct which caused the cyber-attack damages had nothing to do with Foote, so Music Group cannot establish factual or legal cause as a matter of law.

On August 28, 2013, Music Group terminated Foote's consulting contract, as was its contractual right, with no mention of any fault on the part of Foote. The plain language of Foote's written contract with Music Group establishes the limited nature of his obligations. Nothing in Foote's written contract provides that he is responsible for the intentional conduct of Music Group's own employees, or that he agreed to be a guarantor of Music Group's technology infrastructure and security. Music Group's First Amended Complaint should be dismissed.

II. FACTUAL BACKGROUND

A. The Parties

Music Group is an international company, headquartered in the Philippines, with over 3,500 employees located in offices in at least seven countries. Declaration of Jared M. Ahern in

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Support of Motion for Summary Judgment ("Ahern Decl.") Ex. 1 (Music Group's 30(b)(6) deposition transcript) pp. 86:9–18 (offices); 18:6–8 (employees). It has $260 million in annual revenues, and has been run since its inception more than twenty-six years ago by its founder and current CEO, Uli Behringer. *Id.* pp. 60:5–12 (number of employees); 69:2–25 (founding).

David Foote, a resident of San Francisco, California, is an inventor with numerous issued patents. Declaration of David Foote in Support of Motion for Summary Judgment ("Foote Decl.") ¶ 3. He formerly worked as an employee of Music Group from 2007 to 2008. *Id.* In 2010, Music Group contacted him to assist with its technology department, and he entered into a consulting agreement with the company in August of that year. *Id.* ¶ 4.

B. The August 27, 2010 Consulting Agreement

Music Group's legal claims arise out of the August 27, 2010 consulting agreement (the "Consulting Agreement"). First Amended Complaint ("FAC") Ex. A. Foote and Music Group were the only parties to the Consulting Agreement. *Id.* Music Group prepared the contract using one of its standard forms. Foote Decl. ¶ 4; Declaration of Heather MacKay in Support of Motion for Summary Judgment ¶ 4.

The Consulting Agreement provided that Music Group would pay Foote a minimum of $5,000 per month, with a 40 hour per month expected work schedule. FAC Ex. A ¶ 4. Music Group agreed to pay Foote $125 per hour for additional time. *Id.* The agreement specified that the "Consultant is, and shall at all times during the term of this Agreement, be deemed to be an independent contractor and not an employee of Behringer."[1] *Id.* Recital A; *see also* Ahern Decl. Ex. 1 p. 107:9–14 (Music Group's 30(b)(6) witness admitting Foote was a consultant).

Music Group alleges Foote breached paragraph 2 of the Consulting Agreement by "failing to provide the agreed-upon IT Services . . . ." FAC ¶ 8.

Paragraph 2 of the Consulting Agreement provides:

[1] At the time the Consulting Agreement was entered into, Music Group was known as "Behringer Macao Commercial Offshore Limited."

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

> **Duties**
> The Consultant shall perform his obligations hereunder faithfully and to the best of his ability under the direction of the BEHRINGER CEO and acting COO. The Consultant shall devote such of his business time, energy and skill as may be reasonably necessary for the performance of his duties. Nothing contained herein shall require the Consultant to follow any directive or to perform any act which would violate any laws, ordinances, regulations or rules of any governmental, regulatory or administrative body, agent or authority, any court or judicial authority, or any public, private or industry regulatory authority.
>
> The Duties will be as follows:
> This is to be a big picture evaluation of all IS systems and personnel. Investigate and analyse the current systems that are in place as well as those that are not being utilized completely or properly. Create a status report and gap analysis on the short falls that need to be looked at as well as a conclusive report of your recommendations moving forward.
> Meet with the COO and work on a strategic plan for the IS departments.
>
> Scope of engagement
> - High level strategic vision and guidance for IT/IS projects
> - Management and negotiation of external project relationships with focus on SCM and ERP implementation and projects
> - Management/Guidance of IT and IS organizations
> - IT/IS Budget, Resource and project rationalization.

Notably, the "Duties" section explains Foote's obligations. The "Scope of Engagement" defines the areas where he would provide advice. Nothing in the Duties section obligated Foote to implement any advice he provided.

The Consulting Agreement also provides, in Paragraph 16, that:

> No agreement or understanding varying or extending this Agreement shall be legally binding upon either party unless in writing and signed by both parties.

Additionally, with regard to obligations after the termination of the Consulting Agreement, unlike paragraphs 7, 9, 10 and 11, the indemnification provision in paragraph 14 has *no continuing obligations* post-termination. Finally, the Consulting Agreement provides, in paragraph 6, under what circumstances the contract could be terminated. Section 6.1 states that Music Group shall state in writing if it is terminating the agreement because of the consultant's

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

conduct, and it lists what conduct can be grounds for termination. Section 6.3 provides that either party may terminate the agreement without cause.

C. Foote's Work as a Consultant

Foote drafted the status report referred to in the "Duties" paragraph of the Consulting Agreement, and delivered it to Behringer in September 2010 (the "Report"). Foote Decl. ¶ 5. There is no dispute that Music Group received it. Ahern Decl. Ex. 1 pp. 228:17–229:13 & Ex. 13 to the Deposition (the Report). As described below, Foote also advised Music Group to hire a team of dedicated technology professionals as part of his duties to advise Music Group on big picture matters.

When asked what specific provisions of the Consulting Agreement Foote had breached, Music Group's 30(b)(6) witness, CEO Behringer, could not identify any specific term, but instead vaguely referred to paragraph 2. Ahern Decl. Ex. 1 pp. 174:9–175:4. When pressed for a specific term listed in paragraph 2, the witness testified that "these are legal questions." *Id.* p. 177:16–24. And that "I think it's a legal question I'm not capable of answering that in detail." *Id.* p. 175:5–10.

Music Group admitted that there was no writing that modified the terms of the Consulting Agreement. *Id.* pp. 170:14–171:11.

Music Group's 30(b)(6) witness CEO Behringer testified that he has little if any responsibility at the company:

> Q. Well, you're in charge; right?
> A. I don't think a CEO is in charge of everything.
> Q. But the VP of technology reports to you; right?
> A. That's correct.
> Q. If something goes wrong and he screwed up, that's your fault, isn't it?
> A. I don't think so.
> Q. When is it your fault?
> A. You hire executives who are in charge of certain disciplines, and they take responsibility.
> Q. But when do you take responsibility?
> A. By hiring the right people.
> Q. But how about if the people don't turn out to be right? Is that your responsibility?
> A. Well, I hire executives who are responsible for their areas.
> Q. I understand that, okay? But if those executives don't turn out to be good, is that your

fault?

A. I don't think it's my fault.

Ahern Decl. Ex. 1 pp. 112:19–113:24.

Although Behringer testified that he was not responsible for the performance of people he hired and managed, he testified Music Group held Foote, a consultant, as the guarantor of the job performance of everybody in the company's internal technology department, despite no such obligation existing in the Consulting Agreement.

A. Well, I hire an executive who I believe is qualified, whom I trust to protect the company and do the best for the company. And ultimately I hold him responsible.
Q. Right. And that's the way it works throughout the company; right? Don't your managers hire people that they expect to do their job?
A. That's correct.
Q. And if they don't do their job, then it's their responsibility.
A. If people don't do their job for what they are hired, then they're responsible for them, yes.
Q. And so if it's your view that Mr. Foote didn't do his job for what he was retained to do, isn't it your responsibility?
A. No.
Q. But it's Mr. Foote's responsibility for people who the technology organization retained for their job; is that right?
A. For what they are hired for, yes.

Ahern Decl. Ex. 1 p. 184:5–25.

D. Music Group's Network Technology Staff

In 2011, pursuant to Foote's recommendation in the Report, Music Group hired a dedicated team of network security specialists. Foote Decl. ¶ 6. It hired Jim Ratchford to be the Senior Vice President of Technology, and hired Tim Driggers as Global Vice President of Technology Operations. Ahern Decl. Ex. 3 (Deposition Transcript of Timothy Driggers) pp. 30:13–31:8. Driggers had "21 to 26" individuals reporting to him alone. *Id.* pp. 35:17–36:7.

Driggers hired [redacted] and [redacted] to the company network technology team. They worked out of Music Group's United Kingdom office. *Id.* pp. 58:25–59:16. [redacted] was "the manager directly in charge of the network security," and he was [redacted]

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

supervisor. *Id.* p. 59:8–24. Driggers was [redacted] supervisor. *Id.* p. 59:2–5.

Driggers testified as to the important position of trust [redacted] and [redacted] occupied:

Q. Okay. In regard to [redacted] role in Music Group - -
A. Okay.
Q. - - I take it in that position he had a lot of access to network passwords?
A. Correct.
Q. Was he in a gatekeeper role with if he was a bad apple, there's basically nothing you can do with regard to security to stop him?
A. Correct, but he wouldn't be the only one in that position.
Q. Who else would be in that position?
A. [redacted] would have been in that position. Unai Rodriguez would have been in that position.

Id. pp. 63:20–64:7.

Prior to the attack, Foote recommended to CEO Behringer that [redacted] and [redacted] be terminated. Ahern Decl. Ex. 4 (Music Group's responses to requests for admissions No.'s 17 and 18).

At deposition, Behringer testified as follows on this subject:

Q. Right. And isn't it a fact that [Foote] had concerns about [redacted] while he was employed - - while he was consulting for Music Group?
A. I heard about those.
Q. You knew about them; right?
A. Yes.
Q. And he suggested in his role as a consultant that you terminate [redacted]; right?
A. He mentioned it to me, yes.

Ahern Decl. Ex. 1 p. 194:16–24.

Music Group did not terminate these employees.

E. The Intentional August 17, 2013 Cyber-Attack is Carried Out and Foote's Contract is Terminated Effective August 23 With No Claim He Violated Any Obligation Owed to the Company

On August 17, 2013 Music Group's computer network was the subject of an intentional attack. Ahern Decl. Ex. 4 (Music Group's supplemental response to request for admission No. 2).

Music Group sent Foote a termination letter dated August 28, 2013, which stated that effective August 23, 2013 his "services to the MUSIC Group . . . are no longer required."

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Ahern Decl. Ex. 5. This letter gave no notice that Foote had violated any contractual obligation to the company. *Id.*

F. Music Group's Investigation Determines that [redacted] and [redacted] Carried out the Cyber-Attack

A Music Group internal investigation concluded that [redacted] and [redacted] carried out the attack. Ahern Decl. Ex. 6 (Music Group Internal Report) & Ex. 4 (Music Group's answer to special interrogatory No. 17, which specifies that the findings of Music Group's investigation into the cause of the cyber-attack was contained in this report). Music Group's internal report, authored by current Music Group senior technology executive Victor Lau, identified [redacted] and [redacted] as the perpetrators. Ahern Decl. Ex. 6; Ex. 1 p. 27:8–15; Ex. 4 (answer to special interrogatory No. 20 (identifying Lau as the author of the report)).

In email communications with the police in the United Kingdom, Behringer also identified [redacted] and [redacted] as the attackers. Behringer represented the following in the e-mail:

[redacted]

Ahern Decl. Ex. 7 p. 6 (capital letter emphasis in original).

Music Group does not contend that Foote carried out the attack. It admits it has no evidence he had anything to do with it. Ahern Decl. Ex. 1 p. 182:8–11; Ex. 4 (Music Group's answer to special interrogatory No. 17).

Nonetheless, ignoring that Foote was acting as a consultant hired pursuant to a written contract that nowhere mentions the word security or provides any guarantee regarding his advice, Music Group's 30(b)(6) witness on the contract, CEO Behringer, testified as follows:

> Q. Okay. So what facts as you sit here today led you to conclude that Mr. Foote violated this contract that's been marked as Exhibit 11?
>
> A. He almost lost the company. He almost destroyed the company that I built for 25 years because the obligation that Mr. Foote had of protecting the company and putting the safety measures in place were not performed by him and his team.

Ahern Decl. Ex. 1 pp. 178:21–179:4.

And despite suing for alleged indemnification from Foote, the only third party claim that Music Group has faced relating to the attack is a lawsuit filed against it by Presidio Inc., an IT consulting group. *Id.* p. 180:7–12. Presidio filed the lawsuit because Music Group refused to pay its bill for work it did in assisting Music Group after the cyber-attack. Ahern Decl. Ex. 8. After claiming in its counter-claim that Presidio committed fraud, Music Group settled the case for $250,000, which was $50,000 more than the amount Presidio invoiced, and that Music Group refused to pay prior to that litigation. (Ahern Decl. Exs. 9 (answer and counter-claim) & 10 (stipulated dismissal).

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

G. Music Group's only Claimed Damages are Those Allegedly Caused By the Cyber-Attack Which the Company Concluded was Carried Out by Employees [redacted] and [redacted]

All of Music Group's claimed damages flow from the intentional cyber-attack. FAC ¶¶ 17, 22, 26; Ahern Decl. Ex. 1 p. 275:5–6 (30(b)(6) witness Behringer testifying damage spreadsheet totaling company damages was created by asking its department heads to calculate dollar figures based on whether money was spent because "of the impact of the cyber attack.").

III. ARGUMENT

A. Legal Standard on Summary Judgment

The complaint defines the factual and legal issues for a summary judgment motion. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (denying the plaintiffs summary judgment on a legal theory because the theory was not raised in the complaint). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A factual issue is only genuine if a reasonable jury could find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). A fact is only material if it "might affect the outcome of the suit under the governing law . . . ." *Anderson*, 477 U.S. at 248. Summary judgment should be granted if the moving party demonstrates that the non-moving party lacks evidence in support of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

B. Foote is Entitled to Summary Judgment on the Breach of Contract Claim

Foote is entitled to summary judgment on the breach of contract cause of action on multiple grounds.

1. Interpretation of the Contract is a Question of Law

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal.App.4th 221, 228 (2014).[2] Interpretation of a contract is a question of law. *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal.App.4th 1441, 1448 (1997) ("[T]he interpretation of the contract is a question of law for the trial court and for this court."). The goal of contract interpretation is to give effect to the parties' mutual intent. Cal. Civ. Code § 1636; *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264 (1992); *Southern Pac.*

[2] A federal court sitting in diversity jurisdiction applies the choice of law rules of the forum state. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012). Pursuant to California choice of law rules, the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state." *Hurtado v. Superior Court*, 11 Cal.3d 574, 581 (1974). California law therefore applies in this diversity case.

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Transp. v. Santa Fe Pac. Pipelines, Inc., 74 Cal.App.4th 1232, 1240 (1999). "It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." *Winet v. Price*, 4 Cal.App.4th 1159, 1166 (1992).

Here, the language of the Consulting Agreement is clear, the FAC pleads no ambiguity, and Music Group's 30(b)(6) witness does not disagree. Ahern Decl. Ex. 1 p. 168:24–25 ("I think the scope of the engagement is clear.").

2. There was no Breach of any of Foote's Contractual Obligations

Music Group alleges that Foote breached the Consulting Agreement by "failing to provide the agreed-upon IT Services . . . ." FAC ¶ 8. The only provision of the Consulting Agreement that Music Group contends Foote breached is paragraph 2. FAC ¶ 8 (citing paragraph 2 as the provision that was breached).

Paragraph 2 clearly and unambiguously does not create a contractual duty to safeguard the network security of Music Group, or to prevent internal cyber-attacks. The only mandatory obligations imposed upon Foote in paragraph 2 are in the Duties provision. And that provision simply says that Foote will provide advice to the best of his abilities as directed by the COO and CEO of the company.

There is no evidence that Foote did not fulfill his written contractual duties. He delivered a status report to CEO Behringer in or around September 2010, which set out a comprehensive strategy for improving Music Group's technology processes and infrastructure. This was the "big picture evaluation" required of him. And this report also constituted his "recommendations moving forward." The contract required Foote to take direction from CEO Behringer, and to do so "faithfully and to the best of his ability." Foote did this.[3]

[3] Foote performed the duties to the best of his ability, as required by the Consulting Agreement. Foote Decl. ¶ 8. *See Samica Enters., LLC v. Mail Boxes Etc. USA, Inc.*, 637 F.Supp.2d 712, 718 (C.D. Cal. 2008). Here, there is no dispute that Foote used his best efforts in providing his $125 per hour consulting services. He assisted Music Group with assembling a large technology staff, supervised by experienced full-time employees. There was not one written complaint by Music Group concerning his services, up to and including the letter terminating the contract.

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Simply put, there is no contractual obligation that required Foote to prevent intentional conduct by Music Group's own employees. Instead, a plain reading of the contract's terms establish it was not his responsibility and therefore summary judgment is appropriate. *United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988) ("Summary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning."); *Netbula, LLC v. Bindview Dev. Corp.*, 516 F.Supp.2d 1137, 1157 (N.D. Cal. 2007) (granting summary judgment because there was no "evidentiary basis on which a reasonable jury could conclude that Defendants breached the alleged agreement.").

3. Music Group's Damages Were not Caused by Foote

Summary judgment is also appropriate because Foote's actions were not the cause of the contractual damages allegedly sustained by Music Group.

"In breach of contract actions, damages cannot be presumed to flow from liability. It is essential to establish a causal connection between the breach and the damages sought." *Metzenbaum v. R.O.S. Assocs.*, 188 Cal.App.3d 202, 211 (1986). The test for causation in a breach of contract action is whether the breach was a substantial factor in causing the damages. *Bruckman v. Parliament Escrow Corp.*, 190 Cal.App.3d 1051, 1063–64 (1987). The term "substantial factor" has no precise definition, but "it seems to be something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result." *Espinosa v. Little Co. of Mary Hospital*, 31 Cal.App.4th 1304, 1314 (1995).

Even if it could somehow be established that Foote was in breach of the contract, Music Group cannot establish that Foote was a substantial factor in causing the cyber-attack. Instead, the undisputed evidence is that Music Group's damages were caused by Music Group's employees, [redacted] and [redacted], as well as the company's decision not to fire those individuals even after Foote warned it of the risk they posed to the company. And Music Group has further admitted that it has no evidence that Foote had anything to do with the cyber-attack.

This analysis comports with the legal principal that whether a party is a substantial factor in causing contract damages is informed by public policy. *Bruckman v. Parliament Escrow Corp.*, 190 Cal.App.3d 1051, 1063–64 (1987). Here, there is no public policy rationale supporting finding a part-time consultant responsible for damages suffered by a $260 million a year corporation when its own network employees attacked the computer network they were in charge of safeguarding. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 351 cmt. f (stating that it is not in the "interest of justice" to award damages in cases where there is an "extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability.").

4. Music Group's Alleged Damages are not Recoverable Because they were Not Foreseeable by Foote at the Time of Contracting

The contract claim also fails because Music Group's alleged damages are not recoverable because they were not contemplated by the parties at the time of contracting. *Ash v. North American Title Co.*, 223 Cal.App.4th 1258, 1268 (2014) ("Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable."). Here, no reasonable jury could find that the contract contemplated that Foote would be responsible for millions of dollars in alleged damages resulting from the intentional conduct of Music Group's employees.

Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51 (1906) is illustrative. In *San Lorenzo*, a water company contracted with a fruit packing business to deliver water to the latter's property, install a fire hydrant on the property, and connect the hydrant to the water main. *Id.* at 52–53. The water company failed to install the fire hydrant, and subsequently a fire damaged portions of the property. *Id.* at 53–54. The fruit packing business alleged that under its contract with the water company, the water company was liable for the damages caused by the fire because the hydrant, if properly installed, would have stopped the fire. *Id.* at 54. In affirming the trial court's legal ruling, the California Supreme Court explained that the damages were not recoverable because the parties had not contemplated that the water company would be liable for fire damages as a result of contractual non-performance. *Id.* at 57.

Music Group's damage claim is no different. In fact, the situation here is even more compelling than that in *San Lorenzo*. Foote could never have contemplated under the contractual terms that he was personally assuming responsibility for damages caused by the intentional misconduct of every Music Group employee, including being required to stop Music Group employees with high level network access from sabotaging the computer network. At least in *San Lorenzo*, the water company obviously knew that a fire hydrant would be useful in stopping fires.

As the California Supreme Court explained in *San Lorenzo*:

> This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought, must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow, in the ordinary course of things, from a breach, and, therefore, to have in effect stipulated against.

Id. at 56.

Just as there were no facts showing that the water company agreed to assume liability for fires in *San Lorenzo*, there are no facts indicating that Foote agreed to assume liability for an intentional internal cyber-attack. Hence, Music Group's contractual damage claim is barred as a matter of law. *Martin v. U-Haul Co. of Fresno*, 204 Cal.App.3d 396, 409 (1988). ("The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting.").

Finally, Foote's limited hourly rate, part-time hours, and status as an independent

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

contractor, as compared to Music Group's status as a company with $260 million in yearly revenue, further supports a finding that Foote did not agree to assume liability for the damages claimed in this case. *Twin City Fire Ins. Co. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1426 (9th Cir. 1986) (applying Oregon law) (stating that "one of the purposes of a contract is to shift reasonably foreseeable business risks."); *see also Lamkins v. International Harvester Co.*, 182 S.W.2d 203, 205 (Ark. 1944), *cited with approval in* RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. f ("[W]here the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed.").

C. Foote is Entitled to Summary Judgment on the Contractual Indemnity Claim

Paragraph 14 of the Consulting Agreement provides, in its entirety:

> Consultant shall indemnify and hold harmless BEHRINGER and its officers, agents, employees, successors and authorized assigns from and against any and all liabilities, damages, costs, losses, claims, demands, actions, and expenses (including reasonable attorneys' fees) arising in consequence of the gross negligence or willful misconduct of the Consultant or a breach by the Consultant of any term herein or gross negligence on the part of the Consultant in connection with the performance of his duties.

FAC Ex. A.

Multiple legal principles require dismissal of any claim based on this contractual provision.

1. There can be no Liability on the Indemnity Clause Because Foote did not Breach the Consultancy Agreement and any Damages Suffered by Music Group were not Caused by Foote

Initially, before any liability on the indemnity clause can be established, Music Group must have suffered damages that "[arose] in consequence" of Foote's conduct. FAC Ex. A ¶ 14.

Music Group's damages did not arise from any conduct of Foote, but rather were the result of the intentional act of [redacted] and [redacted] as well as Music Group's own negligence in retaining those individuals after being warned of the risk they presented.

Further, the indemnification clause requires that Foote be in breach of the agreement, committed willful misconduct, or have been grossly negligent. Here, no reasonable jury could find that he did any of these things.

As established above, Foote did not breach the Consulting Agreement. Music Group does not even allege that Foote is guilty of willful misconduct (nor is there any evidence that suggests that he is), and therefore there can be no liability on the indemnification agreement by its plain terms. Foote was also not grossly negligent. *Kearl v. Bd. of Medical Quality Assurance*, 189 Cal.App.3d 1040, 1052 (1986) (defining the higher standard of gross negligence as the "want of even scant care or an extreme departure from the ordinary standard of conduct."). He cannot be liable for mere negligence as discussed below. Therefore, the indemnity claim fails based on the plain terms of the indemnification clause.

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

2. The Indemnity Cause of Action also Fails Because it Only Covers Damages Caused by Third-Party Claims

"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Cal. Civ. Code § 2772. Generally, an indemnity agreement "undertakes to protect the indemnitee against loss or damage through liability to a third person." *Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1396; *see also Myers Bldg. Indus., Ltd. v. Interface Technology, Inc.* 13 Cal.App.4th 949, 969 (1993) ("A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons.").

"An indemnity agreement may provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee." *Rooz v. Kimmel* 55 Cal.App.4th 573, 583 (1997). And it is only where an agreement clearly and expansively explains an indemnification provision will act as an exculpatory clause between the parties that the courts will interpret them in such a manner. *Id.* at 586. As one court explains it: "[i]f the parties go out of their way and say 'we really, really mean it,' language clearly contemplating exculpation may be enforced." *Queen Villas Homeowners Assn. v. TCB Property Management*, 149 Cal.App.4th 1, 6 (2007).

Here, the indemnification clause at issue woefully lacks such clarity and thus it cannot be interpreted as exculpation for Music Group's own conduct, especially in light of applicable legal rules. First, the clause was drafted by the alleged indemnitee, Music Group, and must be interpreted against it. Cal. Code of Civ. Pro. § 1654. Music Group's superior bargaining position also requires a narrow interpretation of Foote's obligations as a matter of public policy. *City of Bell v. Superior Court*, 220 Cal.App.4th 236, 249 (2013) ("In a noninsurance indemnity agreement, however, it is the indemnitee who may often have the superior bargaining power, and this gives rise to public policy concerns which influence how such agreements are construed.").

The clause's language also states that Foote must "indemnify" and "hold harmless" Music Group's "officers, agents, employees, successors and authorized assigned." This language makes no sense with regard to claims between Music Group and Foote, as it plainly contemplates a third-party bringing a claim against such "officers and assigns," not Foote relieving such individuals from their own liability. *See Queen Villas*, 149 Cal.App.4th at 4–6 (ruling as matter of law the indemnification clause could not be interpreted as exculpatory clause for the management company's own conduct); *City of Bell,* 220 Cal.App.4th at 251–54 (ruling as a matter of law, based on language in indemnification clause, that it did not cover first party claims between the contracting parties).

Under this clause, Music Group cannot bring a contractual indemnity claim based on damage caused by its own conduct.

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

3. Music Group's Negligence Forecloses its Recovery Under an Indemnitee Theory

Contractual indemnity will also not lie where the alleged indemnitee is negligent, and the indemnification provision only runs one way. *E. L. White, Inc. v. Huntington Beach*, 21 Cal.3d 497, 507 (1978) ("Even an indemnitee who has been only passively negligent may be precluded from indemnification if the contractual provision agreed upon provides indemnity only for liabilities resulting from acts of the indemnitor and not from those of others."). And as a corporation, Music Group can only act through its employees. *Stanford University Hospital v. Fed. Insurance Corp* 174 F.3d 1077, 1085 (9th Cir. 1999).

Here, Music Group was negligent because its own employees conducted the attack, and the company continued to employ these employees even after Foote informed it of the risk they posed to the company. *Phillips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 1139 (2009). ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others."); *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828, 836 (1992) ("The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work entrusted to him.") (internal ellipsis omitted).

Because of its own negligence, the law bars Music Group from seeking indemnity from Foote.

4. Social Policy does not Support Requiring Foote to Indemnify Music Group

Music Group can also not seek indemnity as a matter of public policy. *Continental Heller Corp. v. Amtech Mechanical Services*, Inc., 53 Cal.App.4th 500, 506 (1997) (stating that indemnification agreements are "subject to certain limitations of public policy."). Here, Music Group was in a "better position to protect against loss arising out of its performance of its contract" than was the potential indemnitor, Foote. *Id.* Music Group was in control of its

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

physical and organizational infrastructure, it could buy insurance, it could hire and fire employees, and it could generally take steps to mitigate any risks presented by its employees. In contrast, Foote worked on a part-time basis as an independent contractor, and provided advice to senior management which they could either take or ignore. The hugely disparate economic resources of the parties also make it unreasonable to require Foote to indemnify Music Group as a matter of public policy. *See Jones v. Strom Constr. Co.*, 527 P.2d 1115, 1118 (Wash. 1974), *cited with approval in Continental Heller*, 53 Cal.App.4th at 506 n.4, (finding subcontractor with contract worth 1/20 of the entire project cost was not liable on an indemnity theory to the general contractor).

5. Music Group Never Made a Timely Claim for Indemnification Against Foote During the Term of the Contract

At no time during the pendency of the Consulting Agreement did Music Group make a claim for indemnity against Foote. As analyzed above, because this is a non-insurance indemnity contract, drafted by Music Group, it must be interpreted against Music Group. The indemnity clause does not specify that Foote's obligations under that clause continue post-termination, and the termination letter Music Group sent to Foote mentions nothing about indemnity. In contrast, paragraphs 7, 9, 10 and 11 of the Consulting Agreement specify that they are continuing obligations. The indemnification agreement thus should not be interpreted in such a way that a continuous obligation is written into that provision. Therefore, the indemnity cause of action fails because the claim to indemnity was not made during the contract term.

D. Foote is Entitled to Summary Judgment on the Negligence Claim

Music Group's negligence claims fails on two separate grounds: (1) Foote owed no tort duty to Music Group as a matter of law; and (2) Foote was not the factual or legal cause of the cyber-attack, and therefore was not the cause of any of Music Group's claimed damages.

1. Music Group Cannot Establish Foote Owed a Tort Legal Duty

To establish negligence, Music Group must prove that Foote breached a legal duty.

Mendoza v. City of Los Angeles, 66 Cal.App.4th 1333, 1339 (1998). "The question of the existence of a legal duty of care in a given factual situation presents a question of law which is to be determined by the courts alone." *Nichols v. Keller*, 15 Cal.App.4th 1672, 1682 (1993).

Music Group alleges Foote "breached his duty of care to Plaintiff and was grossly negligent when he failed to perform his obligations under the defined services of the Consultancy Agreement . . . ." FAC ¶ 21. Therefore, Music Group's negligence claim relies on the contract.

But outside of the insurance context, there can be no tort recovery based upon an alleged duty created by a contract. *Brown v. Cal. Pension Adm'rs & Consultants*, 45 Cal.App.4th 333, 346 (1996); *see also Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 102 (1995) (setting out "general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of an independent duty arising from principles of tort law."). This case does not involve an insurance contract, and Music Group does not allege that Foote breached any independent legal duty; rather it simply alleges that a duty in tort arises from the contract.

Foote expects Music Group to cite *North American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764 (1997) on the duty issue. But the duty language in *North American* has been limited to the facts of that case by subsequent California Supreme Court authority. As the California Supreme Court explained in a post-*North American* ruling, "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Erlich v. Menezes*, 21 Cal.4th 543, 551 (1999). And such cases only arise when the legal duty is "either completely independent of the contract or arises from conduct which is both intentional and intended to harm." *Id.* at 552. Here, Music Group's alleged tort duty is based solely on the contract and the claim fails as a matter of law. *See id.* at 554 ("If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies.").

Valenzuela v. ADT Sec. Servs., 820 F.Supp.2d 1061 (C.D. Cal. 2010) correctly applies

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Erlich in a summary judgment motion context on similar facts to this case. There, a jewelry store that had been burglarized was attempting to hold the alarm company liable in tort by claiming that the company negligently performed its security contract. *Id.* at 1072. The court granted summary judgment on the negligence claim, explaining that "the evidence presented by the parties points only to ADT's failure to provide the services it agreed to provide under the Agreement itself." *Id.* Here, like the jewelry store owner, Music Group is attempting to impose tort liability based on Foote allegedly not performing the agreed upon contractual services.

Finally, imposing a legal tort duty on Foote to prevent all economic harm to Music Group would be contrary to public policy, as it would allow Music Group to shift the responsibility for its own conduct to a consultant. *Ratcliff Architects v. Vanir Construction Management, Inc.*, 88 Cal.App.4th 595, 605 (2001) ("Courts are reluctant to impose duties to prevent economic harm to third parties because as a matter of economic and social policy, third parties should be encouraged to rely on their own prudence, diligence and contracting power, as well as other informational tools.").

Foote did not owe a duty of care to Music Group separate and apart from his contractual duties, and therefore the cause of action for negligence fails as a matter of law.

2. *Music Group Cannot Establish the Necessary Legal Causation For Its Negligence Claim*

Legal causation is the proper subject for a motion for summary judgment. *Capolungo v. Bondi*, 179 Cal.App.3d 346, 355 (1986) (granting summary judgment in favor of the defendant, and deciding, as a matter of law, that proximate cause was not established).

Music Group has admitted that the cyber-attack (and therefore all of its claimed damages) was caused by an intentional act. Ahern Decl. Ex. 4 (Music Group's supplemental response to request for admission No. 2.) An internal report produced by Music Group, which was identified in discovery as constituting its conclusion as to who carried out the cyber-attack, identified [redacted] and [redacted] as the perpetrators. Ahern Decl. Ex. 6. In fact

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

Music Group was so sure of [redacted] and [redacted] involvement that it, through Behringer, contacted the law enforcement authorities in Manchester, England, identified [redacted] and [redacted] as the perpetrators, and essentially requested that they be arrested. Ahern Decl. Ex. 7.

Thus, even assuming that Music Group could somehow establish a legal duty owed by Foote, the negligence cause of action fails because the causal chain between any conduct of Foote on the one hand, and any damages on the part of Music Group on the other, is broken by the intervening, superseding intentional acts of [redacted] and [redacted]. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1200 (C.D. Cal. 2003) ("Even where a tortfeasor's conduct is a substantial contributing factor to injury or loss, it will not be held liable if "an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.") (applying California law); *Hardison v. Bushnell*, 18 Cal.App.4th 22, 26 (1993) ("[W]here there is an independent intervening act which is not reasonably foreseeable, the defendant's conduct is not deemed the legal or proximate cause."); *Gonzalez v. Derrington*, 56 Cal.2d 130, 133, 363 (1961) (finding that gas station that negligently sold gas in an open container was not the proximate cause of injuries sustained when the purchasers of the gasoline intentionally burned down a bar).

Additionally, Music Group's failure to remove [redacted] and [redacted] after notice is also a superseding cause of the attack. *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1145 (2009) (discussing tort of negligent retention). Finally, Foote's action or non-action was not the factual, or "but for" cause of the attack. *Mitchell v. Gonzales*, 54 Cal.3d 1041, 1049 (1991) (stating that factual, also known as "but for," causation is necessary to establish negligence). [redacted] was in charge of network security and somebody in such a position could do extensive damage regardless of any systems in place. Ahern Decl. Ex. 3 pp. 63:20–64:7; *see Nola M. v. University of Southern California*, 16 Cal.App.4th 421, 435 (1993) (USC not liable, as a matter of law, for attack carried out on campus).

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200

IV. CONCLUSION

For the reasons stated herein, Foote respectfully requests that the Court enter summary judgment in his favor on Music Group's First Amended Complaint.

Dated: April 14, 2015

THOITS LAW

By: /s/ Andrew P. Holland
Andrew P. Holland
aholland@thoits.com
Mark V. Boennighausen
mboennighausen@thoits.com
Jared M. Ahern
jahern@thoits.com
Attorneys for Defendant and Counter-Claimant David Foote

THOITS LAW
A PROFESSIONAL CORPORATION
400 MAIN STREET, SUITE 250
LOS ALTOS, CALIFORNIA 94022
(650) 327-4200